the Walapai Tribe by Army officials on July 8, 1881, and on January 4, 1883, President Arthur, by Executive order, reserved the same lands for the Walapai Tribe (R. 4, 5, 6, 7). It was alleged and admitted that the Walapai Tribe has continuously occupied and had possession of all of the lands, from time immemorial until the filing of the complaint, as its ancestral home (R. 8, 9, 14, 15, 16). It was further alleged that on July 27, 1866, and on March 12, 1872, the date when Atlantic and Pacific Railroad Company filed its map of definite location, the lands were subject to the claim and right of occupancy of the Walapai Tribe, which right was never voluntarily ceded or extinguished (R. 8, 15, 16, 17); that the railroad had not constructed its railroad through the Walapai Reservation up to January 4, 1883, as required by act of July 27, 1866, *supra* (R. 9). Patents have been issued to defendant to the odd-numbered sections outside the reservation under a mistake of fact and of law, but no patents have been issued to the defendant for lands within the reservation (R. 18). The defendant continually trespasses, and threatens to exclude the Government and Walapai Tribe from the odd-numbered sections (R. 8, 16). The prayer asked that it be declared that the grant was subject to the continued right of occupancy of the Walapai Tribe; and that defendant be enjoined from asserting any interest in the land and from trespassing (R. 19, 20).

REASONS FOR GRANTING THE WRIT

I

THE COURT BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY DIRECT DECISION OF THIS COURT

In holding that an Indian tribe which had continuously occupied lands in the area ceded by Mexico under the Treaty of Guadalupe Hidalgo (9 Stat. 922), from pre-Spanish times to the filing of the complaint, and had never voluntarily relinquished or ceded its rights, had no right to continue its occupancy of the same lands as against a railroad claiming unencumbered ownership of odd-numbered sections under a grant of public lands from the United States, the Circuit Court of Appeals passed on a novel and important question of Indian law which has not been, but should be settled by this Court.

The case presented a question which the court below was required for the first time to pass upon, and in its decision the court below did not purport to follow any of the decisions of this Court. Indeed, the Circuit Court cited no authority on the rights of these and other Indians in the Mexican cession who had occupied lands from pre-Spanish times. Nor did it cite any authority for its conclusion that Indians had no rights of occupancy under Spanish or Mexican law. Although the court conceded the universal rule, that Indian tribes in all other areas had a right of occupancy

similar to the right claimed for the Indians in this case, no factual reason was given for distinguishing between tribal rights in the Mexican cession and in other areas.

II

THE DECISION BELOW APPEARS TO BE IN CONFLICT WITH ANALOGOUS DECISIONS OF THIS COURT

This Court has held so frequently that the Indian right of occupancy claimed in this case exists everywhere else in the United States, without making any qualification or limitation on the rights, that it was unreasonable for the court below to hold that similar rights do not exist in the Mexican cession.[1] This Court has not passed expressly upon the rights which Indian tribes have to the lands they occupied when the Mexican cession came to this country. It has determined that the Federal Government respected the Indian right of occupancy in California, within the Mexican cession, in holding that public lands in California occupied by individual Indians, who had no right to preempt the lands, were excluded from a railroad grant similar to the act of July 27, 1866 (14 Stat. 292).[2] This

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[1] *Johnson* v. *McIntosh*, 8 Wheat. 543; *Worcester* v. *Georgia*, 6 Pet. 515; *Mitchel* v. *United States*, 9 Pet. 711; *Wilcox* v. *Jackson*, 13 Pet. 498; *United States* v. *Cook*, 19 Wall. 591; *Beecher* v. *Wetherby*, 95 U. S. 517; *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55; *Spalding* v. *Chandler*, 160 U. S. 394; *Minnesota* v. *Hitchcock*, 185 U. S. 373.

[2] *Cramer* v. *United States*, 261 U. S. 219, 227.

Court has held that lands not in the Mexican cession, occupied by Indians, do not pass to a railroad under a grant. *Leavenworth, Lawrence, and Galveston Railroad Co.* v. *United States*, 92 U. S. 733, *Northern Pac. Ry. Co.* v. *Wismer*, 246 U. S. 283. This Court has also held that under a railroad grant which provided for extinguishment of Indian titles otherwise than by voluntary cession of the Indians, the title to the land included within the grant passed to the railroad, but the title was subject to the continued right of the Indians to occupy the land until their title was extinguished by the United States. *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55. See *United States* v. *Northern Pacific Ry. Co. et al.*, decided December 16, 1940 (pp. 19, 20).[3]

The decision below gives the Indians in the Mexican cession a status and rights inferior to the status and rights of Indians in other

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[3] The Indian right of occupancy was protected and enforced in *Buttz* v. *Northern Pacific Railroad*, *supra*, in territory included in the Louisiana Purchase which was under Spanish sovereignty from the Treaty of Fontainbleau, November 3, 1762 (13 Register of Debates, pt. 2, 24th Cong., 2d sess., appendix 226 (1837)), until the treaty between France and Spain, October 1, 1800 (Binger Hermann, The Louisiana Purchase 17, 26 (Govt. Ptg. Off. 1898)). Although the Louisiana Purchase was proclaimed by this country October 31, 1803 (2 Stat. 245), the transfer of possession was almost directly from Spain to the United States, inasmuch as French governors occupied New Orleans for only 20 days between the Spanish and American occupations (Binger Hermann, The Louisiana Purchase 34).

parts of the country, whereas previous efforts to set Indians in the Mexican cession apart from other Indians have been rejected by this Court. It has held that Indians in the Mexican cession are under the guardianship of the United States and the Indian liquor laws apply to them, *United States* v. *Sandoval*, 231 U. S. 28; that the tribes have the right to sue to prevent sale of their lands, *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110; and that a conveyance of Indian interests in land within the Gadsden Purchase, where the Government claimed the lands were public lands subject to the ordinary right of Indian occupancy, was invalid because it was not approved by the Government as required by Revised Statutes, section 2103, and Revised Statutes, section 2116, whether the Indians were Pueblos or nomadic, *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315.

III

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS ERRONEOUS

It is submitted that the decision below is erroneous for the following reasons:

1. The court below concedes (R. 206) that it has been the policy of the United States to accord to Indian tribes a right to occupy the lands they have claimed and occupied from time immemorial. It has denied, however, that that policy is applicable in the case of the tribes of the Mexican cession. However, there is no sound reason for such a dis-

crimination against the latter tribes. In all other matters tribes in the Mexican cession have the same legal status and the same rights of self government as tribes elsewhere. It has been recognized by the courts,[4] and by the executive departments of the Government[5] that no legal distinction exists between these tribes and the tribes in other parts of the country. If the reason for according occupancy rights to Indian tribes was "upon the policy of maintaining just and peaceable relations with the Indians," as the court below said (R. 206), that reason existed as strongly in the Mexican cession as in any other area. For it has been judicially determined that tribes in the Mexican cession[6] and particularly the Walapai Tribe (*Lake* v. *United States*, 35 Ct. Cls. 15 (1899)) have the political capacity to make war upon the United States, which they have in fact done.

2. The court below has held that, in the absence of affirmative recognition by the United States of the right of occupancy claimed by the Walapai

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[4] *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Sandoval*, 231 U. S. 28; *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110; *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315; *United States* v. *Walker River Irr. Dist.*, 104 F. (2d) 334 (1940).

[5] Report of Comm. of Indian Affairs (1872), p. 82; Walapai Papers 196; 54 I. D. 359 (1934); see 25 L. D. 408 (1897).

[6] *Collier* v. *United States*, 173 U. S. 79; *Barrow, Porter & Co.* v. *United States, Mohave, Cosnejo, and Navajo Indians*, 30 Ct. Cls. 54 (1895); *Tully* v. *United States*, 32 Ct. Cls. 1 (1896); *Scott* v. *United States and Apache Indians*, 33 Ct. Cls. 486 (1898).

Tribe, no such right exists. However, this Court has expressly held, and with particular reference to Indians of the Mexican cession, that affirmative recognition is not a *sine qua non* of the existence of the Indian right of occupancy. In *Cramer* v. *United States*, 261 U. S. 219, it said (p. 229):

> The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy.

Cf. Central Pacific Ry. Co. v. *Alameda County*, 284 U. S. 463.

Moreover, even if affirmative recognition were necessary, the court below has entirely ignored statutes and treaties involving such recognition.[7]

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[7] Treaty of Guadalupe Hidalgo, February 2, 1848, Art. XI (9 Stat. 922) (protection secured to Indian tribes as regards their aboriginal homes); act of February 27, 1851, sec. 7 (9 Stat. 574, 587) (Indian trade and intercourse laws extended to New Mexico); act of July 22, 1854, sec. 7 (10 Stat. 308) (laws prohibiting preemption of Indian lands prior to extinguishment of Indian title extended to New Mexico); act of February 23, 1865 (13 Stat. 432) (authorized the Government to acquire Indian possessory rights in Utah); act of July 27, 1866, sec. 2 (14 Stat. 292) (authorized the Government to extinguish Indian titles on route of Atlantic and Pacific Railroad); treaties of September 9, 1849 (9 Stat. 974), and June 1, 1868 (15 Stat. 667) (Navajo Indians surrendered rights to their country, reserving hunting rights); act of July 16, 1894 (28 Stat. 108) (Utah disclaimed rights to lands held by Indians); act of June 20, 1910 (36 Stat. 557) (New Mexico and Arizona disclaim title to Indian lands). See Walapai Papers, 357–359 (appropriations for Walapai Tribe).

No stronger recognition could possibly be given by the Government than to permit the Walapai Tribe to continue a physical occupation of the land as was done in this case. Yet, the decision below would authorize the railroad to remove the Indians from the lands when no political department of the Government has required them to surrender possession.

3. After holding that affirmative recognition of the asserted right of occupancy was required but was not present in this case, the court below went on to declare that there had in fact been a positive denial of that right. It discovered the existence of such a denial by a process of construction of, and the drawing of inferences from, statutes and governmental action, only part of the latter being a matter of record. However, the materials on which the court relied do not show any denial of the existence of the right of occupancy here asserted. For example, the court below referred (R. 207) to the act of July 22, 1854 (10 Stat. 308), terming it "one of the most significant pieces of legislation by Congress in this connection." But, far from proving a denial of the existence of the right of occupancy, that act confirmed its existence. For section 7 of that act extended section 10 of the Preemption Act of September 4, 1841 (5 Stat. 453), to New Mexico, thereby permitting preemption rights to be initiated only on lands not subject to Indian title.

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Nor does the establishment of the Lower Colorado River Reservation (act of March 3, 1865, 13 Stat. 541, 559) show any such denial. It is not plain that that reservation was created for the Walapai Indians, because they were mountain Indians and not "Indians of said river and its tributaries" within the terms of the act.

The fact that the military authorities may have removed some of the Walapai Indians to that reservation in 1874 (R. 211) can hardly be conclusive proof that the Lower Colorado River Reservation was established for the Walapai Tribe. Nor would such military action amount to a denial of the existence of a right of occupancy or cause the loss of any rights. *Fort Berthold Indians* v. *United States*, 71 Ct. Cls. 308 (1930). The doctrine that forcible removal of individuals of a particular race to military camps results legally in a loss of property rights has no place in the law of the United States. This Court has held that the exercise of military force against Indians is not the true measure of their legal rights. *Shoshone Tribe* v. *United States*, 299 U. S. 476; *United States* v. *Shoshone Tribe*, 304 U. S. 111. Certainly, the forcible removal of the Walapais in 1874 was entirely deprived of significance as a denial of the right of occupancy when in 1875 (Walapai Papers 104, 108) the same military authorities permitted the Walapais to return to their accustomed abodes and in 1881 established the Walapai military res-

ervation for their use. Equally plain, the act of February 20, 1925 (43 Stat. 954), does not show a denial of occupancy right, notwithstanding the contrary reasoning of the court below (R. 211–212). That act merely authorized the exchange of privately owned and Indian lands within the Walapai Reservation if there were any privately owned lands therein.

In short, there has been no positive denial of the right of occupancy of the Walapai Tribe. If there were, it would appear unmistakably because Congress would have expressly so declared and not left the matter open to be discerned only by an intricate process of statutory construction and implication. 34 Op. Atty. Gen. 171, 172. *Cf. Leavenworth, Lawrence, and Galveston R. R. Co.* v. *United States*, 92 U. S. 733, 740.[5]

4. The decision below is based almost wholly on the holding that the Indians of the Mexican cession other than in "exceptional instances" had no rights whatever under Spanish and Mexican law. That holding, it is remarkable to note, was in reality no more than an assumption because not a single authority was cited in support of it. Furthermore, it is entirely unsound. The Spanish and Mexican law accorded to Indian tribes rights of

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[5] The Atlantic and Pacific Railroad Company, predecessor of the defendant, also recognized outstanding Indian occupancy titles along its proposed route. *Atlantic and Pacific Railroad* v. *Mingus*, 165 U. S. 413.

occupancy substantially similar to those accorded generally to Indian tribes by the United States.[9] With regard to Indian tribes occupying lands acquired by the United States from Spain other than the Mexican cession, this Court has repeatedly recognized that such tribes have rights of occupancy *Mitchel* v. *United States*, 9 Pet. 711; *Chouteau* v. *Molony*, 16 How. 203; *United States* v. *Arredondo*, 6 Pet. 691; *United States* v. *Perchemau*, 7 Pet. 51, 86.[10] And, it may also be noted that with particular reference to the lands of the Mexican cession, this Court has also recognized in *Cramer* v. *United States*, 261 U. S. 219, that Indians had rights of occupancy.

5. In its decision, the Circuit Court of Appeals invoked the doctrine of judicial notice to preclude the Government from offering evidence on important issues in the case. It did this by taking notice not only of evidence and conclusions of fact presented by the defendant but of the broad proposi-

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[9] Indian Land Cessions in the United States, vol. 18, pt. 2, Bureau of American Ethnology (H. R. 118, 56th Cong., 1st sess. (1899) 539-545); Hall's Laws of Mexico, secs. 36, 38, 40, 45, 49, 85, 195; 2 White's Recopilacion 34, 50, 51, 54, 59, 95, 98; Franciscus de Victoria (1480–1546), De Indis et de Ivre Belli Relectiones, Classics of International Law, Carnegie Institution (1917), 128, 137-139, 149.

[10] As a matter of fact, *Johnson* v. *McIntosh*, 8 Wheat. 543, 574, decided that the Indian occupancy doctrine had received universal recognition; *Worcester* v. *Georgia*, 6 Pet. 515, 544, decided that the principle was acknowledged by all European nations and referred to it as the common law of European sovereigns respecting America.

tion that no countervailing evidence could possibly be produced, and no contrary facts could be established, by the plaintiff.

The court below and the defendant assert that "in exceptional instances as in the case of the lands of the Pueblo Indians" (R. 206) some Indian tribes enjoyed recognized rights to lands in the Mexican cession. The question whether the Walapai Tribe falls within the class of exceptional instances involves a conclusion of fact which may turn upon whether the Walapai Indians were mere nomadic wanderers or whether they actually occupied the area as alleged in the complaint. The obscurity of this question is shown by the failure of the Surveyor General for the Territory of New Mexico in 1858 to report the existence of at least three communities or groups of Indians in the Mexican cession, two of which (Santa Ana and Zuni) subsequently had their possessory rights confirmed by Congress (act of February 9, 1869, 15 Stat. 438; act of March 3, 1931, 46 Stat. 1509), and one of which—a community of Papago Indians whose manner of living is similar to that of the Walapai Tribe—has never been expressly accorded any "Pueblo" rights by Congress, but has been recognized by this Court as having a right to sue with respect to community land claims. *Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110; *Pueblo of Santa Rosa* v. *Fall,* 273 U. S. 315. On issues of this sort the United States and the

Walapai Indians deserve a day in court and an opportunity to present evidence.

In dismissing this case, the trial court acted upon a motion to dismiss buttressed by a 58-page memorandum of points and authorities (R. 26–84), 10 supplementary appendices (R. 85–145), and excerpts from a brief in another case with its own appendices (R. 145–189), and concluded that the plaintiff could not possibly produce evidence refuting the matters of which the court took judicial notice (R. 195). Even if the court was justified in taking judicial notice of facts thus produced by the defendant which the plaintiff has had no opportunity to rebut or explain by evidence—a practice condemned as indefensible (9 Wigmore on Evidence (3d ed. 1940) secs. 2565–2567)—and even if the court below was justified in extending the scope of judicial notice to difficult and controversial issues of anthropology with respect to the land tenure of an obscure Indian group and to equally difficult issues of history with respect to administrative acts of the Government that were only occasionally matters of record, the court was unjustified in holding, in the guise of judicial notice, that there was nothing more to be said on the subject and that the inadequate and one-sided collection of reports presented by the defendant could not possibly be supplemented by any countervailing evidence. Such a use of judicial notice is unprecedented and unjustifiable. *Ohio Bell Tel.*

Co. v. *Comm.* 301 U. S. 292, 300; 9 Wigmore on Evidence (3d ed. 1940) secs. 2565–2567.

IV

IMPORTANCE OF THE CASE

The decision below presents an important question of Indian law in a vast area which contains a large number of Indian tribes. There are tribes of Pueblo Indians, the Navajo Tribe, the Utes, the Apaches, the Papagos, the Pimas, the Mohaves, the Yumas, the Paiutes, the Maricopas, and the Walapai, among others, in the Mexican cession, and the decision is a matter of great concern to them and to the public generally in the Southwest. These tribes and consequently their neighbors in the Southwest are affected by the decision, not alone in their land rights, but by implication in their water rights. It comes as startling and deeply upsetting news to the Indians in the Mexican cession and the Gadsden Purchase that they never had any possessory rights to the lands which are their homes; that they are discriminated against by being given an inferior status to other Indians in the United States.

The decision is also of great importance to the Department of the Interior. Successive Solicitors of that Department have recognized aboriginal Indian occupancy rights in the Mexican cession, Walapai Papers 196; 54 I. D. 359 (1934) (see Report of Commissioner of Indian Affairs

(1872), p. 82), and for many years the Department has administered all of the Indian lands in the area upon the belief that the Indians there had the same rights of occupancy as Indians elsewhere. The physical administration of the lands in the Mexican cession, the protection of their soil covering, the preservation of their waters and watersheds are all affected in the decision. If the United States does not own the lands involved in this suit, the Department of the Interior will be confronted with another Indian tribe without adequate lands. It is essential to the administration of the affairs and property of the United States and the Indians in the Mexican cession that this Court review the decision of the Court of Appeals which appears to be directly contrary to the understanding on which the Department of the Interior has acted over a period of many years.

Finally, the suit was instituted as a means of complying with the request of the Senate Committee on Indian Affairs (Walapai Papers 356) that there be a searching, final determination of the rights of the Walapai Tribe before further action is taken toward the consolidation and exchange of reservation lands under the act of February 20, 1925 (43 Stat. 954), and before drastic steps to remove the Walapai Indians, or to exchange the lands, are taken, and to comply with the Senate Committee's request, this Court should review the decision of the Circuit Court of Appeals.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari be granted.

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The Solicitor General authorizes the filing of this petition.

Francis Biddle
Solicitor General

January 1941.

APPENDIX

The pertinent provisions of the act of September 4, 1841 (5 Stat. 453, 455, 456), are:

> SEC. 10. *And be it further enacted*, That from and after the passage of this act, every person being the head of a family, or widow, or single man, over the age of twenty-one years, and being a citizen of the United States, or having filed his declaration of intention to become a citizen, as required by the naturalization laws, who since the first day of June, A. D. eighteen hundred and forty, has made or shall hereafter make a settlement in person on the public lands to which the Indian title had been at the time of such settlement extinguished, and which has been, or shall have been, surveyed prior thereto, and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be, and is hereby, authorized to enter with the register of the land office for the district in which such land may lie, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land, subject, however, to the following limitations and exceptions: * * * no lands included in any reservation, by any treaty, law, or proclamation of the President of the United States, or reserved for salines, or for other purposes; no lands reserved for the support of schools, nor the

> lands acquired by either of the two last treaties with the Miami tribe of Indians in the State of Indiana, or which may be acquired of the Wyandot tribe of Indians in the State of Ohio, or other Indian reservation to which the title has been or may be extinguished by the United States at any time during the operation of this act * * *.

The pertinent provisions of the Treaty of Guadalupe Hidalgo, February 2, 1848 (9 Stat. 922, 929, 930), are:

> ART. VIII. Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.
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> * * * * *
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> In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.
>
> ART. IX. Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the

Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

* * * * *

ART. XI. Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the Government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the Government of the United States whensoever this may be necessary; and that when they cannot be prevented, they shall be punished by the said Government, and satisfaction for the same shall be exacted—all in the same way, and with equal diligence and energy, as if the same incursions were meditated or committed within its own territory, against its own citizens.

It shall not be lawful, under any pretext whatever, for any inhabitant of the United States to purchase or acquire any Mexican, or any foreigner residing in Mexico, who may have been captured by Indians inhabiting the territory of either of the two Republics; nor to purchase or acquire horses, mules, cattle, or property of any kind stolen within Mexican territory by such Indians.

And in the event of any person or persons, captured within Mexican territory by Indians, being carried into the territory of the United States, the Government of the latter engages and binds itself, in the most solemn manner, so soon as it shall know of such captives being within its territory, and shall be able so to do, through the faithful exercise of its influence and power, to rescue them and return them to their country, or deliver them to the agent or representative of the Mexican Government. The Mexican authorities will, as far as practicable, give to the Government of the United States notice of such captures; and its agents shall pay the expenses incurred in the maintenance and transmission of the rescued captives; who, in the meantime, shall be treated with the utmost hospitality by the American authorities at the place where they may be. But if the Government of the United States, before receiving such notice from Mexico, should obtain intelligence, through any other channel, of the existence of Mexican captives within its territory, it will proceed forthwith to effect their release and delivery to the Mexican agent, as above stipulated.

For the purpose of giving to these stipulations the fullest possible efficacy; thereby affording the security and redress demanded by their true spirit and intent, the Government of the United States will now and hereafter pass, without unnecessary delay, and always vigilantly enforce, such laws as the nature of the subject may require. And finally, the sacredness of this obligation shall never be lost sight of by the said Government when providing for the removal of the Indians from any portion of

the said territories, or for its being settled by citizens of the United States; but on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain.

* * * * *

The pertinent provisions of the act of July 22, 1854 (10 Stat. 308), are:

An Act to establish the offices of Surveyor General of New Mexico, Kansas, and Nebraska, to grant Donations to actual Settlers therein, and for other purposes:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, by and with the advice and consent of the Senate, shall be, and he is hereby, authorized to appoint a Surveyor General for New Mexico, whose annual salary shall be three thousand dollars, and whose power, authority, and duties shall be the same as those provided by law for the Surveyor General of Oregon; * * *

SEC. 2. *And be it further enacted*, That, to every white male citizen of the United States, or every white male above the age of twenty-one years who has declared his intention to become a citizen, and who was residing in said Territory prior to the first day of January, eighteen hundred and fifty-three, and who may be still residing there, there shall be, and hereby is, donated one quarter section, or one hundred and sixty acres of land. And to every white male citizen of the United States, or every white male above the age of twenty-one years, who

has declared his intention to become a citizen, and who shall have removed or shall remove to and settle in said Territory between the first day of January, eighteen hundred and fifty-three, and the first day of January, eighteen hundred and fifty-eight, there shall in like manner be donated one quarter section, or one hundred and sixty acres, on condition of actual settlement and cultivation for not less than four years: *Provided, however,* That each of said donations shall include the actual settlement and improvement of the donee, and shall be selected by legal subdivisions, within three months after the survey of the land where the settlement was made before the survey; and where the settlement was made after the survey, then within three months after the settlement has been made; and all persons failing to designate the boundaries of their claims within that time, shall forfeit all right to the same.

SEC. 3. *And be it further enacted,* That, on proof of the settlement and cultivation required by this act, to the satisfaction of the surveyor general, or other officer designated by law for that purpose, subject to the supervision of the Secretary of the Interior, a certificate shall be issued to the party entitled, on presentation of which, if approved by the Secretary of the Interior, a patent shall issue thereon: * * *

SEC. 4. *And be it further enacted,* That none of the provisions of this act shall extend to mineral or school lands, salines, military or other reservations, or lands settled on and occupied for purposes of trade and commerce, and not for agriculture, and all legal subdivisions settled on and occupied, in whole or in part, for purposes of trade and commerce, and not for

agriculture, shall be subject to the provisions of the act of twenty-third of May, eighteen hundred and forty-four, in relation to town sites on the public lands, whether so settled and occupied before or after the survey of said lands, except that said lands shall be donated instead of being sold.

* * * * *

SEC. 7. *And be it further enacted*, That any of the lands not taken under the provisions of this act shall be subject to the operation of the Preemption Act of fourth September, eighteen hundred and forty-one, whether settled upon before or after the survey; and, in all cases where the settlement was made before the survey, the settler shall file his declaration within three months after the survey is made and returned; and any person claiming a donation under this act shall be permitted to enter the land claimed by him at any time prior to the four years' occupancy and cultivation required, by paying therefor at the rate of one dollar and twenty-five cents per acre, and proving occupancy and cultivation up to the time of such payment.

SEC. 8. *And be it further enacted*, That it shall be the duty of the Surveyor-General, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summons witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the

treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act.

* * * * *

SEC. 10. *And be it further enacted*, That the President of the United States shall be and he is hereby, authorized to appoint, by and with the advice and consent of the Senate, a Surveyor-General for the Territories of Nebraska and Kansas, who shall locate his office at such place as the President of the United States shall from time to time direct, and whose duties, powers, obligations and responsibilities and compensation shall be the same as those of the Surveyor-General of Wisconsin and Iowa, and who shall be allowed the same amount for office

rent, fuel, incidental expenses, and clerk hire, as is allowed to said Surveyor-General of Wisconsin and Iowa.

* * * * *

SEC. 12. *And be it further enacted*, That all the lands to which the Indian title has been or shall be extinguished within said Territories of Nebraska and Kansas, shall be subject to the operations of the Preemption Act of fourth September, eighteen hundred and forty-one, and under the conditions, restrictions, and stipulations therein mentioned; *Provided, however*, That where unsurveyed lands are claimed by preemption, notice of the specific tracts claimed shall be filed within three months after the survey has been made in the field, and on failure to file such notice or to pay for the tracts claimed before the day fixed for the public sale of the lands by the proclamation of the President of the United States, the parties claiming such lands shall forfeit all right thereto: *Provided*, said notices may be filed with the Surveyor-General, and to be noted by him on the township plats, until other arrangements shall have been made by law for that purpose.

SEC. 13. *And be it further enacted*, That the public lands in the Territory of Nebraska, to which the Indian title shall have been extinguished, shall constitute a new land district to be called the Omaha District; and the public lands in the Territory of Kansas, to which the Indian title shall have been extinguished, shall constitute a new land district, to be called the Pawnee District: the officers for each of which districts shall be established at such points as the President may deem expedient * * *.

The pertinent provisions of the act of March 3, 1865 (13 Stat. 541, 559), are:

> All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries.

The pertinent provisions of the act of July 27, 1866 (14 Stat. 292), are:

Section 1 created named persons and their future associates as a corporation named Atlantic and Pacific Railroad Company, and empowered the corporation—

> * * * to lay out, locate, and construct, furnish, maintain, and enjoy, a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at or near the town of Springfield, in the State of Missouri, thence to the western boundary line of said State, and thence by the most eligible railroad route as shall be determined by said company to a point on the Canadian River, thence to the town of Albuquerque, on the River Del Norte, and thence, by way of the Agua Frio, or other suitable pass, to the headwaters of the Colorado Chiquito, and thence, along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado River, at such point as may be *be* selected by said company for crossing; thence by the most practicable and eligible route, to the Pacific. * * *
>
> SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to the

said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station-buildings, workshops, depots, machine-shops, switches, sidetracks, turn-tables, and water-stations; and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act.

SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of

land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in

odd-numbered sections nearest to the line of said road, and within twenty miles thereof may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided further*, That no money shall be drawn from the treasury of the United States to aid in the construction of the said "Atlantic and Pacific Railroad."

SEC. 4. *And be it further enacted*, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the

additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid.

* * * * *

SEC. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company.

SEC. 7. *And be it further enacted*, That the said Atlantic and Pacific Railroad Company be, and is hereby, authorized and empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turn-outs, standing places for cars, depots, station houses, or any other structures

required in the construction and working of said road. * * *

SEC. 8. *And be it further enacted*, That each and every grant, right, and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-eight.

SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

* * * * *

SEC. 12. *And be it further enacted*, That the acceptance of the terms, conditions, and impositions of this act by the said Atlantic and Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this Act, and not afterwards, and shall be

deposited in the office of the Secretary of the Interior.

* * * * *

SEC. 17. *And be it further enacted*, That the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid, or assistance which may be granted to or conferred on said company by the Congress of the United States, by the legislature of any State, or by any corporation, person, or persons, or by any Indian tribe or nation through whose reservation the road herein provided for may pass; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use, for the purpose aforesaid: *Provided*, That any such grant or donation, power, aid, or assistance from any Indian tribe or nation shall be subject to the approval of the President of the United States.

* * * * *

The pertinent provisions of the act of July 15, 1870 (16 Stat. 291, 304), are:

For surveying the public lands in Arizona, at rates not exceeding fifteen dollars per lineal mile for standard lines, twelve dollars for township, and ten dollars for section lines, ten thousand dollars: *Provided*, That it shall be the duty of the surveyor-general of Arizona, under such instructions as may be given by the Secretary of the Interior, to ascertain and report upon the origin, nature, character, and extent of the claims to lands in said Territory under the laws, usages, and customs of Spain and Mexico; and for this purpose he shall have all the powers conferred, and shall perform all the duties enjoined upon the surveyor-general of New

> Mexico by the eighth section of an act entitled "An act to establish the offices of surveyor-general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers, and for other purposes," approved July twenty-second, eighteen hundred and fifty-four, and his report shall be laid before Congress for such action thereon as shall be deemed just and proper.

The pertinent provisions of the act of March 3, 1871 (16 Stat. 544, 566), are:

> * * * *Provided*, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

The Executive order of President Chester A. Arthur, of January 4, 1883 (1 Kappler, Indian Affairs, Laws and Treaties, 2d ed., 1904, p. 804), reads:

> It is hereby ordered that the following-described tract of country situated in the Territory of Arizona be, and the same is hereby, set aside and reserved for the use and occupancy of the Hualpai Indians, namely: Beginning at a point on the Colorado River 5 miles eastward of Timakah Spring; thence south 20 miles to crest of high mesa; thence south 40 degrees east 25 miles to a point of Music Mountains; thence east 15 miles; thence north 50 degrees east 35 miles; thence north 30 miles to the Colorado River; thence along said river to the

place of beginning; the southern boundary being at least 2 miles south of Peach Spring, and the eastern boundary at least 2 miles east of Pine Spring. All bearings and distances being approximate.

The act of February 20, 1925 (43 Stat. 954), provides:

> CHAP. 273. An Act To provide for exchanges of Government and privately owned lands in the Walapai Indian Reservation, Arizona.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior is hereby authorized, in his discretion, under rules and regulations to be prescribed by him, to accept reconveyances to the Government of privately owned and State school lands and relinquishments of any valid filings, under the homestead laws, or of other valid claims within the Walapai Indian Reservation in Mohave and Coconino Counties, Arizona, and to permit lieu selections within the boundaries of the said reservation by those surrendering their rights so that the lands retained for Indian purposes may be consolidated and held in a solid area so far as may be possible: *Provided*, That the title or claim of any person or company who refuses to reconvey to the Government shall not be hereby affected.

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